

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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CHARLEN SMITH,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF  
LABOR,

Respondent.

2:09-cv-01892-GMN-RJJ

**AMENDED**  
REPORT & RECOMMENDATION  
OF UNITED STATES  
MAGISTRATE JUDGE  

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(Petition for Judicial Review (#1))

This matter came before the Court on Petitioner Charlen Smith's Motion for Judicial Review of Final Agency Decision (#1). The Court has reviewed Petitioner's Opening Brief (#17), Respondent's Response (#18), and Petitioner's Reply (#20), as well as the administrative record (#10).

**BACKGROUND**

Petitioner Charlen Smith seeks judicial review of a final decision of the Department of Labor denying her claim for survivor benefits under Parts B and E of the Energy Employees Occupational Illness Compensation Program Act of 2000, 42 U.S.C. §§ 7384-7385s-15. On April 27, 2005, Smith filed a claim as the surviving spouse of Floyd Smith, alleging that her husband's metastatic lung cancer and prostate cancer resulted from his work at the Nevada Test Site, a Department of Energy facility.

**A. Administration of the Energy Employees Occupational Illness Compensation Program Act of 2000**

The Energy Employees Occupational Illness Compensation Program Act of 2000

1 establishes a federal compensation program to “ provide for timely, uniform, and adequate  
2 compensation of covered employees and, where applicable, survivors of such employees,  
3 suffering from illnesses incurred by such employees in the performance of duty for the  
4 Department of Energy and certain of its contractors and subcontractors.” 42 U.S.C. § 7384d.  
5 Part B of the Act provides lump sum benefits up to \$150,000, as well as related medical  
6 expenses, to workers who contracted certain diseases (e.g. cancer) as a result of exposure to  
7 radiation and other toxic substances while working for Department of Energy, its contractors, or  
8 subcontractors. 42 U.S.C. § 7384, 7384d. Part E of the Act provides compensation to covered  
9 employees based on the level of impairment and/or wage loss if they develop an occupational  
10 illness as a result of exposure to toxic substances at a Department of Energy facility. 42 U.S.C. §  
11 7385s-2. Survivors of deceased workers may also be eligible to receive compensation. 42 U.S.C.  
12 § 7385s-1.

13 1. Claims under Part B

14 For claims of cancer caused by exposure to radiation during employment at a Department  
15 of Energy facility an individual must file a claim with the Department of Labor’s Office of  
16 Workers’ Compensation Programs. The individual may qualify for compensation under Part B  
17 of the Act by demonstrating that his or her cancer is “at least as likely as not” caused by exposure  
18 to hazardous materials while working on federal nuclear activities. An individual or survivor’s  
19 claim with the Department of Labor’s Office of Workers’ Compensation Programs will be  
20 forwarded to the National Institute for Occupational Safety and Health for a reconstruction or  
21 estimation of the amount of radiation exposure during employment. See 20 C.F.R. §§ 30.100,  
22 30.101, 30.115, 30.210. The dose reconstruction takes into account a number of factors,  
23 including duration of employment. Subject to any additional information provided by the  
24 claimant and revision of the report following the closing interview, the claimant is required to  
25 return a signed statement to National Institute for Occupational Safety and Health certifying that  
26 he or she has no further information to provide and that the record for dose reconstruction should  
27 be closed. 42 C.F.R. § 82.10(m).

28 Causation of the cancer is statutorily presumed if the claimant qualifies as a member of

the Special Exposure Cohort as defined under the Act. 42 U.S.C. § 7384l(14). The President may designate new classes of workers for addition to the Special Exposure Cohort with the assistance of the Advisory Board on Radiation and Worker Health. 42 U.S.C. §§ 7384o, 7384q. If a claimant falls within the Special Exposure Cohort and has a specified cancer, a recommended decision awarding benefits will issue without requiring any further development of the claim. In 2006, a new class of workers was added to the Special Exposure Cohort. This class is comprised of Department of Energy employees, or Department of Energy contractor or subcontractor employees, who worked at the Nevada Test Site from January 27, 1951, through December 31, 1962 for at least 250 days. Petitioner Smith claims that her husband would fall into this category. In filing her initial claim, Smith indicated that her husband had been employed by Reynolds Electric and Engineering Company (REECo), a Department of Energy contractor, at the Nevada Test Site for an unspecified time period. (AR 581).

## 2. Claims under Part E

Under Part E of the Act, an employee of a Department of Energy facility including a worker employed by a Department of Energy contractor or subcontractor is eligible for compensation if he develops a “covered illness” as a result of work-related exposure to a toxic substance. 42 U.S.C. §§ 7385s-1, 7385s-2. The Act defines the term “covered illness” to mean “an illness or death resulting from exposure to a toxic substance.” 42 U.S.C. § 7385s(2). A “toxic substance” is “any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature.” 20 C.F.R. § 30.5(ii).

A claimant must show by a preponderance of the evidence that: (1) he was a Department of Energy contractor or subcontractor employee; (2) he contracted a covered illness; and (3) he contracted the covered illness through exposure to a toxic substance at a Department of Energy facility. 20 C.F.R. §§ 30.5, 30.110, 30.111. A claimant will be determined to have contracted a covered illness through exposure to a toxic substance at a Department of Energy facility if: “(A) it is at least as likely as not that exposure to a toxic substance at a Department of Energy facility was a significant factor in aggravating, contributing to, or causing the illness; and (B) it is at least as likely as not that the exposure to such toxic substance was related to employment at a

1 Department of Energy facility.” See 42 U.S.C. § 7385s-4(c)(1).

2 The district Department of Labor’s Office of Workers’ Compensation Programs office is  
3 charged with making an initial determination whether the claimant is entitled to benefits. 20  
4 C.F.R. § 30.300. The Department of Labor’s Office of Workers’ Compensation Programs then  
5 forwards its recommendation to the Final Adjudication Branch at which point the claimant is  
6 given an opportunity to file an objection to the Department of Labor’s Office of Workers’  
7 Compensation Programs recommendation. 20 C.F.R. § 30.300. If a claimant objects, he may  
8 request a hearing or may request review of the recommendation on the written record. 20 C.F.R.  
9 §§ 30.310, 30.312. In either case, the Final Adjudication Branch will allow the claimant to  
10 submit additional evidence supporting his claim before issuing its final decision. 20 C.F.R. §§  
11 30.313, 30.314, 30.316. Claimants are given an additional opportunity to request reconsideration  
12 of the Final Adjudication Branch’s final decision. 20 C.F.R. § 30.319. Claimants must make the  
13 request in writing within thirty days of the date of decision, and are not entitled to a hearing. 20  
14 C.F.R. § 30.319. If the Final Adjudication Branch determines on reconsideration that additional  
15 factual development is necessary, the Final Adjudication Branch may return the claim to the  
16 Department of Labor’s Office of Workers’ Compensation Programs district office for further  
17 evaluation. 20 C.F.R. §§ 30.317, 30.319.

18 **B. Facts**

19 On April 27, 2005, Smith filed a claim as the surviving spouse of Floyd Smith, alleging  
20 that her husband’s metastatic lung cancer and prostate cancer resulted from his work at the  
21 Nevada Test Site, a Department of Energy facility. Petitioner Smith claims that her husband is a  
22 member of the Special Exposure Cohort, indicating on the employment history form submitted  
23 with her claim that Floyd Smith had been employed by REEC Co, a Department of Energy  
24 contractor, at the Nevada Test Site for an unspecified time period. (AR 581). Department of  
25 Labor’s Office of Workers’ Compensation Programs requested verification of Floyd Smith’s  
26 employment from Department of Energy, which verified that he was employed at the Nevada  
27 Test Site by REEC Co from January 10, 1955 to March 14, 1955, and by Ute, a Department of  
28 Energy subcontractor, for one day on July 11, 1967. (AR 566-568). Petitioner Smith contacted

1 Department of Labor's Office of Workers' Compensation Programs, stating that she disagreed  
2 with the verified employment history and that she had a friend "who knew for a fact" that Floyd  
3 Smith worked at Nevada Test Site from 1955 to 1959. (AR 534). Petitioner Smith later  
4 provided evidence from her friend, Myrtle Green, concerning Floyd Smith's employment  
5 history.<sup>1</sup>

6 On September 12, 2007, Department of Labor's Office of Workers' Compensation  
7 Programs received National Institute for Occupational Safety and Health's final dose  
8 reconstruction report completed on July 18, 2007, and a signed affirmation by Smith that she had  
9 no further information that had not already been provided to National Institute for Occupational  
10 Safety and Health. (AR 151-169). Based upon the dose estimates provided by National Institute  
11 for Occupational Safety and Health in its dose reconstruction report, Department of Labor's  
12 Office of Workers' Compensation Programs calculated a 34.90% probability of causation. (AR  
13 139-150).

14 On September 24, 2008, Department of Labor's Office of Workers' Compensation  
15 Programs issued a notice of recommended decision in which it recommended the denial of  
16 Smith's claim under Part B and Part E. (AR 84-91). The recommended decision found that,  
17 because the probability of causation calculation was less than 50%, Floyd Smith's lung and  
18 prostate cancers did not meet the "at least as likely as not" threshold. As a result, Petitioner  
19 Smith was not entitled to compensation as Floyd Smith's survivor under 42 U.S.C. §§  
20 7384s(a)(1) and 7384n(b).

21 On October 14, 2008, Final Adjudication Branch received a letter from Smith objecting  
22 to the recommended decision and requesting a hearing. (AR 79-81). A hearing was held on  
23 January 14, 2009, at which both Petitioner Smith and Ms. Green testified. (AR 47-63). Smith  
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25 <sup>1</sup> The evidence supplied by Green, a long time acquaintance of Floyd Smith, is as follows: In her  
26 first affidavit, Green indicated that Floyd Smith had worked with her brother, now deceased, at "Mecury  
27 Area 51" from September 1955 to July 1960, and that Floyd Smith "worked holes and pipes." (AR 524).  
28 In her Special Exposure Cohortond affidavit, Green stated that Floyd Smith worked for REECo in Las Vegas,  
Nevada from 1959 to 1967. (AR 215-18). During an oral hearing on January 14, 2009, Green testified that  
Floyd Smith "was working at Mercury. . .in '63," and "maybe in '64." (AR 56). She testified further that  
he worked "up there in '50, way before I came here. Him and my brother was there in every - I think '51."  
(AR 57).

1 was subsequently provided with a transcript of the hearing and given 30 days from the date of the  
2 hearing to submit any additional evidence or argument. (AR 46).

3 On April 10, 2009, Final Adjudication Branch issued a final decision denying Smith's  
4 claim under Part B and Part E. (AR 32-40). By letter dated April 24, 2009, counsel for Smith  
5 requested reconsideration. (AR 28-30). On June 12, 2009, Final Adjudication Branch issued an  
6 order granting Smith's request for reconsideration of its April 10, 2009, final decision, finding, in  
7 part, that the decision had not adequately addressed Smith's objections to Department of Labor's  
8 Office of Workers' Compensation Programs's findings regarding Floyd Smith's dates of  
9 employment at the Nevada Test Site. (AR 25-26).

10 On July 27, 2009, Final Adjudication Branch issued a new Final Decision Following a  
11 Hearing in which it denied Smith's claim under Parts B and E and specifically addressed  
12 Petitioner Smith's objections from the January 14, 2009 hearing (AR 3-12). Petitioner Smith  
13 filed this petition for judicial review on September 28, 2009.

#### 14 DISCUSSION

15 Petitioner Smith argues that the proper standard of review of the final agency decision in  
16 this case is *de novo*. The Respondent argues that the court has jurisdiction to review DOL's final  
17 decision denying Smith's claim under Part B only and that under the Administrative Procedure  
18 Act 5 U.S.C. §§ 701-706, the correct standard of review is the "arbitrary or capricious" standard.  
19 As for the denial of Smith's claim under Part E, the Respondent argues that the court lacks  
20 jurisdiction to review it because Smith failed to file her petition within the time period set forth  
21 in 42 U.S.C. § 7385s-6(a). § 7385s-6(a) states that a "person adversely affected or aggrieved by  
22 a final decision" may file a petition for judicial review "within 60 days after the date on which  
23 that final decision was issued." While Smith acknowledges that her petition was not filed within  
24 60 days of the final decision, she argues that the deadline should be tolled in her favor because  
25 the final decision was not served on her attorney.

#### 26 **A. Standard of Review for Decisions under Part B**

27 The Administrative Procedures Act sets forth standards governing judicial review of  
28 decisions made by federal administrative agencies. *Mountain Rhythm Res. v. FERC*, 302 F.3d

1 958, 963 (9th Cir. 2002). § 706(2)(A) of the Administrative Procedure Act provides that a  
 2 reviewing court may set aside agency decisions found to be “arbitrary, capricious, an abuse of  
 3 discretion or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The standard allows  
 4 for a very narrow review. The reviewing court may not substitute its own judgment for that of the  
 5 agency. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001); *Arrington v. Daniels*, 516 F.3d  
 6 1106, 1112 (9th Cir.2008). However, the agency must have articulated a rational connection  
 7 between the facts found and the conclusions made. *Kern County Farm Bureau v. Allen*, 450 F.3d  
 8 1072, 1076 (9th Cir.2006) (internal quotations and citations omitted).

9 Under this standard the court may only reverse if the agency “relied on factors that  
 10 Congress did not intend for it to consider, entirely failed to consider an important aspect of the  
 11 problem, offered an explanation for its decision that runs counter to the evidence before the  
 12 agency, or is so implausible that it could not be ascribed to a difference in view or the product of  
 13 agency expertise.” *Jordan v. U.S. Dept. of Labor*, 2008 WL 4181377 (E.D. Wash. 2008)  
 14 (applying the arbitrary and capricious standard to the DOL’s denial of a petitioner’s claim under  
 15 Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000).

## 16 **B. Employment History**

17 Petitioner Smith’s claim under Part B of the Act was denied for two reasons. First, it  
 18 could not be determined that Floyd Smith’s cancer was “at least as likely as not” caused by  
 19 exposure to hazardous materials while working on federal nuclear activities. Second, Floyd  
 20 Smith was not deemed to be a member of the Special Exposure Cohort, whereby causation would  
 21 have been statutorily presumed. An important element of both of these inquiries relies on the  
 22 duration of Floyd Smith’s work history with the Department of Energy.

23 The Department of Labor’s Office of Workers’ Compensation Programs determined that  
 24 Floyd Smith had been employed at the Nevada Test Site by REEC Co, a Department of Energy  
 25 contractor, from January 10, 1955 to March 14, 1955, and by Ute, a Department of Energy  
 26 subcontractor, for one day on July 11, 1967. (AR 566-568). Petitioner Smith argues that  
 27 Department of Labor’s Office of Workers’ Compensation Programs’s finding of covered  
 28



1 employment was based only upon records from the Social Security Administration and that those  
2 records were incomplete. Petitioner Floyd Smith claims he actually worked at the Nevada Test  
3 Site for a number of years in the 1950s and 1960s. Smith argues that rejecting the evidence  
4 supplied by Ms. Green regarding Floyd Smith's work history was contrary to the Federal  
5 Regulations governing the implementation of the Energy Employees Occupational Illness  
6 Compensation Program Act of 2000.

7 Generally, "the claimant bears the burden of proving by a preponderance of the evidence  
8 the existence of each and every criterion necessary to establish eligibility. . . ." 20 C.F.R. §  
9 30.111(a). Petitioner Smith erroneously asserts that "[i]n a situation where non-self serving  
10 testimony goes up against an absence of record from an agency, the claimant's testimony is to be  
11 accepted under agency evidentiary rules." Opening Brief, pg. 9:1-3 (#17) (citing 20 C.F.R. §§  
12 30.111 et seq.). The Respondent correctly points out the Petitioner's misreading of the  
13 regulations as follows:

14 Although Smith cites 20 C.F.R. § 30.112 for this assertion, that provision states only that  
15 "[i]f the only evidence of covered employment is a self-serving affidavit and Department  
16 of Energy or another entity either disagrees with the assertion of covered employment or  
17 cannot concur or disagree with the assertion. . . , then Department of Labor's Office of  
18 Workers' Compensation Programs may reject the claim based upon a lack of evidence of  
19 covered employment." 20 C.F.R. § 30.112(b)(3). It does not logically follow from 20  
20 C.F.R. § 30.112(b)(3) that the Department of Labor's Office of Workers' Compensation  
Programs must accept a claim if the only evidence of covered employment is a  
non-self-serving affidavit. DOL's regulations instead make clear that, while affidavits  
will be accepted as evidence of employment history, it is entirely within Department of  
Labor's Office of Workers' Compensation Programs's discretion whether or not to rely  
on submitted affidavits --whether self-serving or not-- in adjudicating a claim for benefits.

21 Response, pg. 17:3-12 (#18) (citing 20 C.F.R. § 30.111(c)).

22 The evidence regarding Floyd Smith's employment history proffered by Ms. Green is  
23 anecdotal and contradictory at best. At one point Ms. Green stated that Floyd Smith worked for  
24 Department of Energy contractors from September 1955 to July 1960. Later, the purported dates  
25 of employment changed to 1959 to 1967. (AR 215-18). Still later, Ms. Green orally testified that  
26 Floyd Smith worked for the Department of Energy "in '63," and "maybe in '64," and that he had  
27 also worked "in '50" and possibly "in '51." Ms. Green's assertions could not be confirmed or  
28 supported by any other evidence. It does not appear that the DOL completely disregarded Ms.



Green's evidence. Rather, the DOL weighed all the evidence and found Ms. Green's affidavits and testimony unconvincing.<sup>2</sup> The DOL's decision to deny Petitioner Smith's claim under Part B of the Act was neither arbitrary nor capricious and will not be overturned by this court.

**C. Court's Lack of Jurisdiction to Review DOL's Denial of Benefits to Smith Under Part E of Energy Employees Occupational Illness Compensation Program Act of 2000.**

Energy Employees Occupational Illness Compensation Program Act of 2000 allows for judicial review of final DOL decisions under Part E as follows:

A person adversely affected by a final decision of the Secretary under [Part E] may review that order in the United States district court . . . by filing in such court within 60 days after the date on which that final decision was issued a written petition praying that such decision be modified or set aside. . . . Upon such filing, the court shall have jurisdiction over the proceeding and shall have the power to affirm, modify, or set aside, in whole or in part, such decision. . . .

42 U.S.C. § 7385s-6(a). The final decision denying Smith's claim under Part B and E of the Act was issued on July 27, 2009. In order for Smith's petition for review of the final Part E denial to be timely under 42 U.S.C. § 7385s-6(a) it needed to be filed by September 25, 2009. Smith's petition was filed on September 28, 2009. Smith argues that Final Adjudication Branch's July 27, 2009 final decision was not served on her attorney. DOL's regulations provide that "[a] copy of the final decision of the Final Adjudication Branch will be mailed to the claimant's last known address and to the claimant's designated representative before Department of Labor's Office of Workers' Compensation Programs, if any. *Notification to either the claimant or the representative will be considered notification to both parties.*" 20 C.F.R. § 30.316(e) (emphasis added). Smith does not allege that she did not receive the July 29, 2009 final decision. Thus, the allegation that her attorney did not receive a copy bears no significance. Therefore, the Court lacks jurisdiction to review the denial of Smith's Part E claim. See *Bowles v. Russell*, 551 U.S. 205 (2007) (statutory deadline for filing notice of appeal is jurisdictional and cannot be equitably tolled).

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<sup>2</sup> The final DOL decision denying Petitioner Smith's claims explained that, "[s]tatemeNevada Test Site provided by way of an affidavit should be considered in light of other evidence submitted in support of a claim. The Department of Energy and CPWR were only able to verify approximately two months of employment in 1955 and one day in 1967." (AR 8-9).

Based on the foregoing and good cause appearing therefore,

Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court on or before September 21, 2010 .**

The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court’s order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 26th day of October, 2012.

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